

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
CHARLES A. LANE, JR.,	)	CASE NO. 05-31229 HCD
	)	CHAPTER 7
DEBTOR	)	
	)	
	)	
MYRANDA J. LOSINIECKI,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 05-3042
	)	
CHARLES A. LANE, JR.	)	
	)	
DEFENDANT.	)	

Appearances:

Michael A. Bianco, Esq., attorney for plaintiff, Newby, Lewis, Kaminski & Jones, LLP, 916 Lincolnway, P.O. Box 1816, LaPorte, Indiana 46350; and

Eric Oden Clark, Esq., and Lori V. Gillis, Esq., attorneys for defendant, 833 W. Lincoln Highway, Suite 405 E., Schererville, Indiana 46375.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 1, 2006.

Before the court is “Creditor, Myranda Losiniecki’s, Complaint Objecting to the Dischargeability of Debt,” filed on June 14, 2005, by the plaintiff in this adversary proceeding. Myranda Losiniecki is the former spouse of the defendant Charles A. Lane, Jr., a chapter 7 debtor. The defendant filed an answer and affirmative defenses on July 8, 2005. Trial on the complaint was held on October 19, 2005. After the parties filed findings of fact and conclusions of law, on November 22, 2005 the court took the complaint under advisement. For the reasons that follow, the court grants the plaintiff’s complaint in part and denies it in part.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The plaintiff's complaint objected to the dischargeability of debts pursuant to 11 U.S.C. § 523(a)(5), (a)(6), (a)(7), and (a)(15). In its Order of August 11, 2005, however, issued after the pre-trial conference, the court determined that § 523(a)(5) and (a)(7) did not apply to the case; it limited the plaintiff's proof to § 523(a)(6) and (a)(15).<sup>1</sup> The record herein and the trial held October 19, 2005, set forth these facts.

Myranda and Charles, the plaintiff and defendant in this proceeding, were married in LaPorte County, Indiana, on September 6, 2003. Their marriage was brief, however. Myranda left Charles in December 2003, and on March 30, 2004, they were divorced pursuant to a Final Dissolution Decree and Property Settlement

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<sup>1</sup> At the telephonic pre-trial conference on August 10, 2005, counsel for the plaintiff was present, but counsel for the defendant failed to appear on behalf of his client. In its Order of August 11, 2005, the court took under advisement the "issue of sanctions against Eric Clark for failing to be available as ordered for the Pre-Trial Conference." R. 10. Despite the possibility of sanctions against him, however, Mr. Clark did not file an exhibit and witness list prior to trial, did not appear at the trial, and sent an unprepared associate to represent his client in his stead. During the trial, the defendant testified that Schedule I, filled out by Mr. Clark or one of his staff, was significantly incorrect. The court then conducted a show-cause hearing on November 10, 2005, and ordered Mr. Clark to appear in person to explain his conduct. Counsel for the defendant did appear before the court and presented his reasons for his nonattendance and other conduct. The court accepted Mr. Clark's apologies and found his justifications credible. It determined, in open court, not to sanction him further.

Agreement in the LaPorte Circuit Court. Almost a year later, on March 17, 2005, Charles filed a voluntary chapter 7 petition. He received his discharge on July 22, 2005, and the case was closed on August 5, 2005.

The only objection raised in Charles's bankruptcy was the complaint filed by his former spouse that is now before this court. The complaint focused on the marital home that Charles and Myranda had purchased in LaPorte, Indiana, prior to their marriage for approximately \$76,000. *See* R.1. In the Property Settlement Agreement, the parties agreed that Charles was entitled to the house, but required him to be responsible for the mortgage, taxes, and other obligations related to the home. He was given one year from the date of entry of the Decree to sell the home or to refinance the mortgage so that the ownership was placed solely in his name. Charles did neither. *See id.* at 2. Nor did he, in that year, make the required mortgage payments. For that reason, First Union Bank of Indianapolis, which held the mortgage, filed a foreclosure action against both the plaintiff and defendant. *See id.*

Concerned about the risk to her personal credit that a foreclosure would impose, the plaintiff returned to the LaPorte Circuit Court. The state court, finding that Charles had failed to abide by the Property Settlement Agreement, conveyed the marital real estate to Myranda. She then prevented the foreclosure by paying the outstanding mortgage debt, including penalties and interest in the amount of \$13,392.41. She paid this sum through a loan from her parents, with the promise that she would repay them from the proceeds of the sale of the home. When Myranda took possession of the home, however, she discovered that there was substantial property damage to it and that extensive repairs were required before the home could be sold. The cost of those repairs, \$12,069.00, was paid through another loan from Myranda's parents. She promised to repay her parents for this loan, as well, once the house is sold.

In her Complaint and at trial, the plaintiff alleged that the defendant, who had possession of the home, caused willful and wanton damage to the property. She asked the court to find that the property settlement debt

be excepted from Charles's discharge under § 523(a)(6)<sup>2</sup>, because the willful and malicious property damage to the marital home was caused by the defendant, and under § 523(a)(15)<sup>3</sup>, because the debt was a property settlement obligation that the defendant was in a better position than the plaintiff to pay.

At trial, the plaintiff presented evidence intended to demonstrate that the defendant failed the tests of both subsections (a)(6) and (a)(15). To show that Charles caused "willful and malicious injury" to the marital home, under § 523(a)(6), Myranda and her father, Steven Losiniecki, testified that the house was filthy and torn up when Myranda gained possession of it in March 2005. They described a yard neglected for a year or more, broken doors, a garage door off the tracks, plumbing in total disrepair, tile torn off the walls, countertops torn off the cabinets, filthy carpet, water damage, and trash everywhere. Steven Losiniecki kept the invoices and receipts from the contractors and servicemen that repaired the house. He testified that, even though he saved money by doing some of the repairs and replacements himself, the cost of the repairs was \$12,069. He stated that he lent his daughter \$12,069 for the repair costs and \$13,400 to stop the foreclosure on the house. Nevertheless, he insisted that he expects her to pay him back. Both Myranda and Steven Losiniecki blamed the defendant for the damage to the house: He was living in the house, they said, and he had responsibility for it until March 2005.

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<sup>2</sup> 11 U.S.C. § 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity."

<sup>3</sup> 11 U.S.C. § 523(a)(15) states that an individual debtor is not discharged from any debt –

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless –

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Charles testified that the house, built in the 1950s, had been in good condition, with a new kitchen (a wedding gift from Miranda's grandfather) and no plumbing problems. Although he lost his job with Centos Uniform Company in June 2004, he lived in the house until sometime in November 2004. He had taken the tiles off the bathroom wall, intending to renovate that room. However, once he lost his job he could not afford to pay the bills or to buy the materials for the bathroom. Nevertheless, he insisted that, when he moved out, the condition of the rest of the house (all except the bathroom) was fine. He did not understand what happened to the house. He would not have destroyed it, he stated emphatically. He did note, though, that when he went back to the house and peered through the picture window, it looked pretty messy inside. Charles stated that he did not dispute the costs of the repair bills or Miranda's payment of \$13,400 to stop foreclosure on the house.

To demonstrate that the defendant's property settlement debt should be found nondischargeable under § 523(a)(15), the plaintiff also presented testimony concerning her own financial circumstances. Miranda stated that she works as a receptionist for Northwest Indiana Eye and Lasik, earning a gross weekly salary of \$520. Previously she had worked as a teller at Wells Fargo Bank and as a medical receptionist at LaPorte Medical Group. When she married Charles, she said, he was working at Centos Uniform Company as a sales representative, making \$50,000 or more a year, and she was making about \$8,000 a year. Miranda testified that her net monthly income is \$1,252.76. *See* Pl. Ex. 5. Her expenditures each month total \$2,365.00 and include a payment of \$1,100 for the house mortgage and rent for the apartment in which she now lives. *See id.*

Charles testified that, after he lost his job with Centos, he could not pay the mortgage. He explained that his roommate, who was supposed to pay some of the mortgage, lost his job, too. His parents were not able to give him the money, either. The defendant admitted that he did not try to sell or to refinance the home, as he was required to do under the Property Settlement Agreement. Nor did he ask Miranda to take over the payments. He said that he lived in the house for about a year after she left, but made no mortgage payments during that time. Even after the state court again ordered him, in 2004, to sell the house or refinance it, he did not do it. For that

reason, he admitted, the house deed was transferred by court order to Miranda. He did not pay any money to keep the house out of foreclosure or to renovate the house once she left.

However, he started working for Municipal Sewer Services in Chicago in March or April of 2005. His work is seasonal; the trucks operate only if the temperatures are above freezing. He therefore cannot work two or two and one-half months of the year. He said he hoped to work until mid-December. After that, he will stay on call for a few weeks, and then the City recommends that he and the other workers apply for unemployment. In March, he can get back to work, he said.

Charles testified that Schedule I, which listed his net total monthly income as \$2,102.97, was incorrect. "That's not even close to what I bring home! I'm not gonna lie to you," he said. For a 40-hour week, he stated, he brings home \$920-940 a week. About \$20 a week is deducted for Indiana state tax, but he certainly is paid more than \$900 to take home each week. In his view, his attorney's secretary had written the information for Schedule I incorrectly. "This is not right," he said. The court asked Charles when he gave his attorney the figures for the schedules. Charles explained that he returned a call from Mr. Clark's office. His secretary said she needed the financial information right away. Charles picked up his weekly paycheck and gave her the information over the phone, he reported. She wrote it down, but when she read it back to him, he corrected it the first time and then they had to start over, he stated. In the end, she said she'd plug all the numbers into the schedules.

Charles's current monthly gross wages are listed on Schedule I as \$5,226.00. *See* Def.'s Ex. A. He testified that he receives weekly a gross pay of \$1,300-1,400. For deductions, he has union dues, taxes, and \$20 a week for living in Indiana. He explained that he pays \$672 for a union card, a one-time payment, and then he pays about \$280 a year in dues. The schedule should not state that he pays \$1,213.33 a month for union dues, he pointed out. *See id.* It should be 1/12 of \$280, around \$23 a month for dues. He admitted that the figures reported as his other deductions seemed high, too. For the months that he works, he said, his total net pay is about \$920 a week, and monthly it's above \$3700. He believed that the expenditures listed on Schedule J, in the total

amount of \$2,671, were not out of line, however. Gas is the only expense that fluctuates, he said. He rents an apartment in Michigan City now. He testified that he lives with Michelle Bouda, a woman he is dating, and he pays her \$915 a month to live in her house.

### Discussion

The court considers first whether the defendant has an obligation to the plaintiff which must be excepted from his discharge pursuant to 11 U.S.C. § 523(a)(6). Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt “for willful and malicious injury by the debtor to another entity or the property of another entity.” To fall within this exception, the plaintiff must show that the defendant debtor harmed the plaintiff and that the injury was both willful and malicious. A “willful” injury is defined as a “deliberate or intentional injury, not merely a deliberate or intentional act that leads to an injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90 (1998); *see also Berkson v. Gulevsky (In re Gulevsky)*, 362 F.3d 961, 964 (7th Cir. 2004) (noting that § 523(a)(6) “does require proof that the injury was intended”). The Supreme Court made clear in *Geiger* that “debts arising from recklessly or negligently inflicted acts do not fall within the compass of § 523(a)(6).” *Geiger*, 523 U.S. at 64, 118 S. Ct. at 978. To demonstrate that the injury also was “malicious” under § 523(a)(6), this circuit requires that it be “in conscious disregard of one’s duties or without just cause or excuse; it does not require ill will or a specific intent to do harm.” *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994). “It is this knowledge of wrongdoing, not the wrongfulness of the debtor’s actions, that is the key to malicious under § 523(a)(6).” *ABF, Inc. v. Russell (In re Russell)*, 262 B.R. 449, 455 (Bankr. N.D. Ind. 2001). The plaintiff has the burden of proving by a preponderance of the evidence that her debt should be precluded from the debtor’s discharge. *See Grogan v. Garner*, 498 U.S. 279, 289, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991).

The court, having weighed the testimony and evidence in the record, finds that the plaintiff has failed to satisfy the requirements of § 523(a)(6) under *Geiger* and Seventh Circuit law. Although it is undisputed that Myranda spent \$12,069 to repair the damaged marital home, there is no proof that the defendant caused the

damage. Charles testified that he removed tiles for a bathroom renovation, but denied that he caused any destruction to the house. Neither Myranda nor her father offered evidence that Charles inflicted the destruction; nor did she challenge the credibility of his denials. Charles admitted that his renovations came to a halt, but Myranda did not establish that the tile removal constituted deliberate, malicious damage. Perhaps Charles's conduct could be characterized as an "intentional act that leads to an injury," *Geiger*, 523 U.S. at 61, but it could not be considered a "deliberate or intentional injury." *Id.*

In addition, the court finds no evidence, direct or circumstantial, of Charles's intent to harm Myranda or her property. Charles's denials were credible, even in light of the clear damage to the house before Myranda took possession of it and in light of the understandable belief, held by Myranda and her father, that no one else could have done the damage. There was simply no evidentiary support for the notion that Charles had acted deliberately to harm Myranda or the marital home, which became Myranda's property in March 2005. *See In re Beck*, 309 B.R. 340, 351 (Bankr. N.D. Cal. 2004) (finding no evidence that debtor bore an intent to harm when he damaged the marble and fixtures); *Redmond v. Finch (In re Finch)*, 289 B.R. 638, 644 (Bankr. S.D. Ohio 2003) (finding no evidence of debtor's intent to harm; stating that mere reckless action was not sufficient). Without facts indicating that the debtor was conscious of wrongdoing, this court cannot find the malice required under § 523(a)(6). *See In re Russell*, 262 B.R. at 455. The court determines that Myranda did not show, by a preponderance of the evidence, that Charles willfully (*i.e.*, deliberately or intentionally) and maliciously (*i.e.*, without just cause or excuse, in conscious disregard of one's duties) injured her or her property. She therefore failed to establish the requisite elements for relief under § 523(a)(6).

The court also is asked to determine whether Charles's property settlement obligation concerning the marital home should be excepted from the defendant's discharge under 11 U.S.C. § 523(a)(15). Subsection (a)(15) prohibits the dischargeability of "any marital debt other than alimony, maintenance or support that is incurred in connection with a divorce or separation." *In re Crosswhite*, 148 F.3d 879, 883 (7th Cir. 1998). Property settlement debts are usually nondischargeable in bankruptcy. However, there are two exceptions to that



rule: (A) The debtor proves that he or she does not have the ability to pay the debt, or (B) the debtor proves that the discharge of that debt would benefit the debtor more than it would harm the debtor's former spouse and children. The plaintiff has the initial burden of proving that she holds a subsection (a)(15) claim against the debtor, and then the burden shifts to the debtor defendant to prove that he falls within either of the two exceptions in § 523(a)(15)(A) and (B). *See id.* at 884. In addition, "the party claiming an exception to discharge usually bears the burden of proving by a preponderance of the evidence that the debt is not dischargeable." *Id.* at 881 (citing *Grogan*, 498 U.S. at 287).

The court finds that the plaintiff succeeded in meeting her initial burden of proving that the debt in question comes within the meaning of the statute. The plaintiff established that the Property Settlement Agreement in the divorce action left the marital property (and responsibility for its mortgage) to the defendant. Myranda paid \$13,392.41 to the bank because Charles failed to pay the mortgage. The parties and the court clearly understood that the debt constituted a property settlement obligation.

The burden then shifted to the debtor to prove that he fell within either of the exceptions listed under § 523(a)(15). To prevail, the debtor "must meet the burden on only one of the two prongs of Section 523(a)(15) to prevent the debt from being excepted from discharge." *Turner v. McClain (In re McClain)*, 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998) (quoting *In re Florez*, 191 B.R. 112, 115 (Bankr. N.D. Ill.1995)).

In considering whether Charles met his burden under § 523(a)(15)(A), the court finds that, on Schedule I, he listed himself as a laborer for the Municipal Sewer Services in Chicago, Illinois. His average monthly income was \$5,226.00 and, after payroll deductions of \$1,909.70 and union dues of \$1,213.33, his total net monthly take-home pay was \$2,102.97, according to Schedule I. On Schedule J, he listed monthly expenses of \$2,671.00. At trial, Charles stated that Schedule J was an accurate accounting of his monthly expenditures but that Schedule I was incorrect. He testified that his income was much higher – \$920-940 a week in take-home pay – and that the deductions from his income were much lower. He pointed out that only about \$23 are deducted each month (\$278 a year) for union dues. According to Charles, the Schedule I listing of \$1,213.33 in union dues

was simply wrong and the total amount of deductions was too high. He suggested that his attorney's secretary had written the information incorrectly when she hurriedly took it down over the telephone.

As can be seen from Charles's testimony, the defendant's monthly income (\$3,900-\$4,000) is significantly greater than his monthly expenditures (\$2,671). Even taking into account that the debtor's job is seasonal and that he must put aside funds for the weeks or months in the winter when the Municipal Sewer Services are closed, he still earns on-call pay or receives unemployment. The court notes, as well, that Charles is living in his girlfriend's home. Because he lists no expenditures for electricity, water, and other utilities, it appears that the girlfriend is paying those costs. The court has no further information about her financial contribution; however, it finds that calculation unnecessary. Charles's own income is enough to permit the payment of the property settlement debt. *See Foto v. Foto (In re Foto)*, 258 B.R. 567, 576-78 (Bankr. S.D.N.Y. 2000) (finding that debtor's own income is enough to permit payment of divorce-related debt without considering income of live-in companion). The court finds, therefore, that the debtor has failed to demonstrate that he cannot pay the debt out of his disposable income. He has not met his burden of proof under § 523(a)(15)(A). The court finds, therefore, that the property settlement debt Charles owes to Miranda is not dischargeable under § 523(a)(15)(A).

The court then considered whether the debtor was able to prevail under subsection (B). The court's comparison of each party's monthly income and expenditures, in light of the totality of their circumstances, was revealing. Miranda works as a receptionist; she currently brings home \$1,252.76 each month and spends \$2,365.00. She therefore has a monthly shortfall of \$1,112.24, and must rely on her parents' help. Previous employment has been equally low paying. She hopes to return to school one day, but cannot afford it now. Miranda's testimony concerning her finances and background was unchallenged by the defendant, and the court found her credible. In fact, after hearing the testimony of each of the three witnesses, observing their demeanor, and reviewing the documentary evidence presented at trial, it found all three witnesses to be believable and

forthcoming. There was no evidence that Myranda either overstated her expenses or understated her income. She lives a frugal lifestyle and still must count on loans from her parents to pay her bills each month.

Charles's salary, when he was working at Centos Uniform Company as a sales representative, was around \$50,000 or more a year. The court was not told why he lost that job or why he remained unemployed for about a year. However, now that he is employed in Chicago, his financial circumstances are much improved. He now brings home about \$3,900 to \$4,000 each month and spends \$2,671. He therefore has disposable income of approximately \$1,300 monthly. The court was given no estimates of Charles's earnings when he is on-call or receives unemployment, during the winter months when he cannot work. Nor does it know the financial contributions being made by the woman in whose house he is living. Nevertheless, the court can find, with the evidence before it, that Charles failed to prove that the discharge of the property settlement debt would benefit him more than it would harm Miranda. It is clear, from the evidence presented at trial, that Myranda has no excess income and that Charles has disposable monthly income. The court finds that Charles's monthly income is almost \$1,750 more than Myranda's but that his expenses are only about \$300 greater than hers. Because Charles's monthly income is considerably more than his own expenses and more than Myranda's income, the court finds that the debtor is in a better position to pay the property settlement debt. It concludes, therefore that the benefit to the debtor, if the debt were discharged, does not outweigh the detrimental consequences to his former spouse, the plaintiff in this case. The court determines that the debt is excepted from the debtor's discharge under § 523(a)(15)(A) and (B).

In sum, the court finds that Myranda, the plaintiff, was unsuccessful in proving, by a preponderance of the evidence, that Charles, the defendant, willfully and maliciously injured her or her property. Because she failed to establish the elements required under 11 U.S.C. § 523(a)(6), the repair costs are dischargeable in Charles's bankruptcy.

However, the court also finds that Charles, the defendant, was unsuccessful in demonstrating, by a preponderance of the evidence, that he fell within the exceptions of § 523(a)(15). The court determines that the

defendant failed to show that he does not have the ability to pay the obligation required under the Property Settlement Agreement dissolving his marriage to Myranda, the plaintiff. *See* § 523(a)(15)(A). The defendant also failed to demonstrate that the benefit to him of discharging the debt is greater than the detrimental effect on Myranda. *See* § 523(a)(15)(B). Consequently, the debtor's property settlement debt is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).

#### Conclusion

For the reasons presented above, the Complaint filed by the plaintiff Myranda J. Losiniecki is granted in part and denied in part. The property settlement debt involving the marital home is excepted from the discharge of Charles A. Lane, the defendant, pursuant to 11 U.S.C. § 523(a)(15). However, the property damage debt is not excepted from the defendant's discharge and is dischargeable in his bankruptcy pursuant to 11 U.S.C. § 523(a)(6).

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT